

1 E. MARTIN ESTRADA
United States Attorney
2 MACK E. JENKINS
Assistant United States Attorney
3 Chief, Criminal Division
ANDREW BROWN (Cal. Bar No. 172009)
4 Assistant United States Attorney
Major Frauds Section
5 1100 United States Courthouse
312 North Spring Street
6 Los Angeles, California 90012
Telephone: (213) 894-0102
7 Facsimile: (213) 894-6269
E-mail: andrew.brown@usdoj.gov
8 Attorneys for Plaintiff
UNITED STATES OF AMERICA
9

10 UNITED STATES DISTRICT COURT

11 FOR THE CENTRAL DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

15 CAROLINE JOANNE HERRLING,
aka "Carrie Phenix,"

16 Defendant.
17

No. 2:23-CR-59-MEMF

GOVERNMENT'S OPPOSITION TO
DEFENDANT'S SENTENCING POSITION;
EXHIBITS

Sentencing: February 9, 2024
2:00 p.m.

18
19 On September 6, 2023, defendant emailed her objections to the
20 Presentence Report to the Probation Office, but did not file them.
21 On January 24 and 25, 2024, the government filed its sentencing
22 positions, which addressed those emailed objections. (Dkt. 46 and
23 47.) On January 29, 2024, defendant filed her sentencing position,
24 which largely restated her initial objections, but did include some
25 new arguments. (Dkt. 51.) Below, the government responds to
26 defendant's new arguments.
27
28

A. THE PREPONDERANCE OF THE EVIDENCE STANDARD APPLIES AT SENTENCING

The Guidelines themselves state that sentencing enhancements are to be shown by the preponderance of the evidence standard. See USSG § 6A1.3, commentary (the “Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements”). The Supreme Court has never endorsed a higher standard of proof at sentencing. Cf., United States v. Watts, 519 U.S. 148, 156 (1997) (“application of the preponderance standard at sentencing” to find facts that inform the court’s selection of a sentence within the prescribed statutory range “generally satisfies due process.”); Alleyne v. United States, 570 U.S. 99, 116 (2013) (“[B]road sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment.”); United States v. Booker, 543 U.S. 220, 233 (2005) (“[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.”); see also 18 U.S.C. 3661 (“No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”).

Defendant argues, however, that the standard of proof for finding facts that support a sentencing enhancement should be clear and convincing:

The defendant submits the proposed adjustments must be proved by the government by clear and convincing evidence since the adjustments lead to a substantial increase in offense levels. See United States v. Mezas De Jesus 217 F.3d 638, 643 N.8. (9th Cir. 2000).

(Dkt. 51, page 4.) It is true that the Ninth Circuit has sometimes required clear and convincing proof of sentencing factors with an extremely disproportionate effect on a defendant's sentence. But defendant has overlooked that those cases do not apply here, where the enhancements are based on the extent of a conspiracy, and the defendant has been convicted of conspiracy:

Enhancements based on the extent of a conspiracy are on a fundamentally different plane than enhancements based on uncharged or acquitted conduct. Due process concerns with regard to the former are satisfied by a preponderance of the evidence standard because the enhancements are based on criminal activity for which the defendant has already been convicted.

United States v. Armstead, 552 F.3d 769, 777 (9th Cir. 2008) (citations and quotations omitted).

The breadth of a conspiracy charge opens a defendant to a similarly broad range of sentencing enhancements. See United States v. Harrison-Philpot, 978 F.2d 1520, 1523 (9th Cir. 1992) (sentencing factor which increased sentencing range from 41-51 months to 292-365 months may be proved by preponderance of evidence because defendant "was charged and convicted of conspiracy [and it was] the extent of the conspiracy [that] caused the tremendous increase in [defendant's] sentence.").

The Ninth Circuit has "repeatedly held that sentencing determinations relating to the extent of a criminal conspiracy need not be established by clear and convincing evidence." United States v. Treadwell, 593 F.3d 990, 1001 (9th Cir. 2010) (emphasis added) (affirming the district court's use of the preponderance standard at sentencing when applying a 22-level enhancement for losses exceeding \$44 million in a conspiracy to commit wire fraud case). Accord, United States v. Berger, 587 F.3d 1038, 1048 (9th Cir. 2009) ("our

1 cases involv[ing] a defendant's fraudulent conduct where
2 sentencing enhancements for financial loss are based on the extent
3 of the fraud conspiracy. . . . hold that facts underlying the
4 disputed enhancements need only be found by a preponderance of the
5 evidence.").

6 In any event, the enhancements found by the Probation Office
7 were generally based on written communications between defendant and
8 her co-conspirators, or recorded calls between them, and so would
9 easily meet the clear and convincing standard, assuming for the sake
10 of argument that it were to be applied.

11 Finally, now that Booker has given district courts the freedom
12 to vary from the sentencing guideline range, the standard of proof
13 for sentencing enhancements is far less important. Even if the
14 Court were to determine that the clear and convincing standard
15 applied, and that a particular enhancement did not meet that
16 standard, nothing would prevent the Court from considering that
17 conduct as an aggravating factor under 3553(a), where the clear and
18 convincing standard does not apply.

19 **B. DEFENDANT'S CONFLICT WITH ANOTHER PRISONER IS IRRELEVANT**
20 **FOR SENTENCING**

21 Defendant asserts in her brief that her sentence should be
22 reduced because she was "physically and sexually assaulted" by
23 another female inmate while detained on this case. (Dkt. 51, page
24 11, item 6.) But defendant's own self-serving emails, written with
25 an eye towards litigation, rebut that claim. Instead, they show
26 that defendant claimed another inmate had subjected her to lewd and
27 unwanted sexual *comments* only. (Dkt. 51-1, exh. D, pages 12-16.)
28 Defendant's complaints were sometimes petty, including that her

1 antagonist received "special treatment, including extra time out of
2 her cell []more than myself." (Dkt. 51-1, exh. D, page 12.)
3 Defendant also contended that she was "shocked by MDC's lack of
4 sensitivity, understanding, and care" regarding her claim of
5 harassment. Id. at 13. According to MDC's investigation of the
6 matter, defendant's antagonist asserted that defendant and her
7 friends had made up the complaint in order to get the antagonist
8 moved, which in fact worked. The antagonist's story is made more
9 credible by defendant's blatantly seeking such a transfer after
10 learning that the Prison Rape Eliminate Act (PREA) mandated it: "It
11 was my understanding that, once a PREA report has been made against
12 an Inmate, the offending party is to be permanently and immediately
13 removed from the presence of the Victim." (Dkt. 51-1, exh. D, page
14 13.) There is no need for the Court to attempt to resolve this she-
15 said-she-said situation. Even if defendant had been subjected to
16 unwanted lewd comments, and the MDC staff had been slow to remove
17 the offending inmate from defendant's presence, that has no bearing
18 on the appropriate punishment for defendant, or the need to protect
19 the public from defendant's criminality.

20 **C. DEFENDANT'S SCHEME KILLED ROBERT TASCON, AND ENDED THE**
21 **LOVE HE SHARED WITH MIRACLE WILLIAMS**

22 While fraud is ordinarily thought of as a purely economic
23 crime, it can also be emotionally devastating, as victims learn to
24 mistrust other persons generally. Suicide remains a rare response.
25 Only two of Bernie Madoff's thousands of victims actually committed
26 suicide. [https://www.nytimes.com/2021/04/14/nyregion/bernie-madoff-](https://www.nytimes.com/2021/04/14/nyregion/bernie-madoff-victims.html)
27 [victims.html](https://www.nytimes.com/2021/04/14/nyregion/bernie-madoff-victims.html). But thoughts of suicide are not rare, particularly
28 among victims of identity theft, who will see their credit destroyed

1 and are often involved in lawsuits as creditors dun them for charges
2 actually incurred by others:

3 A new study reveals a growing number of identity theft
4 victims are having thoughts of suicide after these
5 difficult and often heartbreaking experiences. The
6 Identity Theft Resource Center found 16% of identity crime
7 victims who contacted ITRC in the past year said they've
8 considered suicide.

9 [https://www.koaa.com/money/consumer/study-reveals-increasing-number-](https://www.koaa.com/money/consumer/study-reveals-increasing-number-of-id-theft-victims-are-experiencing-suicidal-thoughts)
10 [of-id-theft-victims-are-experiencing-suicidal-thoughts.](https://www.koaa.com/money/consumer/study-reveals-increasing-number-of-id-theft-victims-are-experiencing-suicidal-thoughts)

11 Unfortunately, defendant's victim Robert Tascon was unusually
12 vulnerable, as he had struggled with mental health issues even
13 before defendant stole his house and only asset by identity theft.
14 He had moved from California to Texas to be with the love of his
15 life, Miracle Williams, and hoped to leave his troubled past behind.
16 He planned to sell the home his parents had left him in Encino to
17 use the proceeds to start over with Ms. Williams in Texas, far from
18 the L.A. drug culture that had bedeviled him.

19 But thanks to defendant and her co-conspirators, Mr. Tascon's
20 plan went awry. Far from having a nest egg to start over, he was
21 forced to use his last money to finance a lawsuit in a vain effort
22 to get back the house that defendant stole from him. This left him
23 "defeated and distraught." (Exh. page 2.) He felt "helpless" and
24 that he would never be free of the trouble he had had in California.
25 He worried about what the criminals who had his identifying
26 information would do next. The stress started to affect him
27 physically. Sometimes he would sit like in a trance, ignoring
28 everyone else in the room. He hated his situation, the stress of
the theft of his house and the lawsuit. (Id.) When Robert Tascon

1 and Miracle Williams were briefly apart due to a birthday party, Mr.
2 Tascon committed suicide. (PSR 47.)

3 When Miracle came home, their garage was covered with
4 blood. She asked for a crime-scene cleaner to come, but
5 no one did. Miracle got a hose, push broom and scrub
6 brush and washed away "my baby's blood and pieces of his
7 brain" for three to four hours, "crying and praying."
8 Miracle did not have enough money for funeral
9 arrangements, "so I cremated my baby, and put his ashes
10 into a necklace." Afterwards, Miracle was so distraught
11 that she overdosed on sleeping pills and was taken to the
12 hospital, and then an in-patient mental health hospital.
13 Miracle has not recovered. She is constantly reminded of
14 Robert by places they went, and friends they knew, or even
15 people who resemble Robert. Now, "I stay in the house, I
16 have trouble going into a store by myself." "I stay on
17 the phone with my mother most of the day because my
18 anxiety is so bad." Miracle would like therapy but cannot
19 afford it. She finds solace at church and wants to read
20 the Bible. On the one-year anniversary of Robert's death,
21 Miracle got his favorite-colored balloons, and released
22 them to heaven with a note to Robert.

23 (Exh. page 3.)

24 **D. DEFENDANT DOES NOT QUALIFY FOR THE ZERO CRIMINAL HISTORY**
25 **POINTS TWO-LEVEL REDUCTION**

26 In defendant's proposed sentencing calculations, she includes a
27 two-level reduction for certain defendants that have zero criminal
28 history points (dkt. 51, page 8), even though the Probation Office
found it inapplicable. Defendant is ineligible for the Section
4C1.1 zero criminal history points reduction for five separate
reasons, any one of which alone would preclude that adjustment.
First, defendant does have one criminal history point for having
been convicted of "trespass: injure property" in 2011, for which she
was sentenced to 18 months of probation. (PSR ¶¶ 105-106; USSG §
4C1.1(a)(1).) Second, the offense resulted in the death of Robert
Tascon. (PSR ¶ 47; USSG § 4C1.1(a)(4).) Third, defendant
personally caused substantial financial hardship to both Robert
Tascon and his common-law wife, Miracle Williams. (Dkt. 47, pages

10-11, 26, and 46-47: defendant stole Robert Tascon's only house, which Miracle Williams should have inherited on Mr. Tascon's death; USSG § 4C1.1(a)(6).) Fourth, defendant possessed many firearms, which appear to have been connected to her offense.¹ (PSR ¶¶ 52, 101; USSG § 4C1.1(a)(7).) Fifth, defendant was a leader of the criminal activity. (PSR ¶¶ 81-86; USSG § 4C1.1(a)(10).)

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Respectfully submitted,

E. MARTIN ESTRADA
United States Attorney

MACK E. JENKINS
Assistant United States Attorney
Chief, Criminal Division

Andrew Brown

ANDREW BROWN
Assistant United States Attorney

Attorneys for Plaintiff
UNITED STATES OF AMERICA

¹ That defendant's firearms were in many cases loaded and "ghost guns" without serial numbers indicates that defendant kept them for nefarious purposes, as does her possession of a silencer made from an oil can. Given defendant's many frauds and her use of other criminals as subordinates, it is not surprising that she would arm herself, particularly because she sometimes unilaterally cut the share of the proceeds allocated to others when she felt they had not performed all the tasks she had assigned them.